To be argued by

WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 92.

(October Term, 1922, No. 518.)

THE UNITED STATES OF AMERICA ex rel. MICHAEL BILOKUMSKY, Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

BRIEF FOR APPELLANT.

Statement of Facts.

This is a direct appeal to this Court from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus (Record, p. 47). It presents ques-

tions under the Fourth and Fifth Amendments to the Constitution of the United States.

Bilokumsky was one of about forty persons arrested by the Philadelphia police on April 26, 1921 (Record, pp. 15, 36). He was held by the city authorities for several weeks in Moyamensing Prison, but the charge of violation of state law under which he was held was finally dropped (Record, p. 24).

The warrant for his arrest in deportation proceedings was not issued by the immigration authorities until May 19, 1921 (Record, pp. 34-35). Before this, while he and the others arrested at the same time were at Moyamensing Prison, the immigration authorities entered into a co-operative arrangement with the city authorities with respect to these prisoners. Immigrant Inspector Benkart reported as follows to his superior on July 11, 1921:

> "With a view to ridding this country of such undesirables, the Mayor and his Cabinet, and the local Division of Investigations, Department of Justice, co-operated with this Service. The co-operation has been full and complete. The arrests were made on April 25-26, and while in the custody of the City authorities the aliens were interviewed under oath to determine their status" (Record, p. 36).

Pursuant to this co-operative arrangement, Bilokumsky was examined by an immigrant inspector at Moyamensing Prison on April 29, 1921, as if in deportation proceedings (Record, pp. 3-5, 31-33). The record of this examination commences:

"EXHIBIT J-1.

MEYAMENSING PRISON,
Philadelphia, Pa.

April 29, 1921.

Alien duly sworn, testifies as follows:" (Record, p. 3).

The record concludes:

"Certified correct copy of stenographic notes of hearing taken by me.

CHAS. B. REISS,
Immigrant Inspector,
(Examining Inspector and Stenographer)"

(Record, p. 5).

The record thus certified purports to record testimony by Bilokumsky to the effect that he arrived in the United States from Russia at Philadelphia on the S. S. Merian on November 10, 1912, and had never been naturalized (Record, pp. 3-4).

At this examination the immigrant inspector was obviously in custody and exercising compulsion over Bilokumsky's person and Bilokumsky was not advised that he was not under compulsion to answer questions. Nor was he advised of his right to counsel or given any opportunity to take measures to secure an impartial conduct and correct record of the hearing.

The record of this hearing as certified by the immigrant inspector was the basis of the subsequent issuance of a warrant for his arrest in a deportation proceeding, and was put in evidence against him in that proceeding. The inspector in charge of the proceedings said (Record, p. 14):

"(By Inspector:) As it is evident that it is impossible to secure information from the alien touching on his status and his right to be and remain in the United States, I will introduce as evidence in this case and make same a part of the record marked Exhibit J, a certificate of alien's landing in the United States.

"I also introduce as evidence and make same a part of the record in this case, a copy of sworn statement made by alien in Moyamensing Prison, Philadelphia, Pa., April 29th, 1921, to Chas. B. Reiss, Immigrant Inspector, marked J-1."

The landing certificate which the inspector thus introduced related to one Michael Bialokon (Record, p. 33) and was not connected with Bilokumsky unless by the record of his examination by Immigrant Inspector Reiss at Moyamensing Prison. *There was no other evidence upon the issue of his alien status.* He was, however, ordered deported (Record, p. 7), and was in the custody of the immigration authorities for deportation when the writ of habeas corpus in this case was sued out.

The single point involved in this appeal is that the examination of Bilokumsky at Moyamensing Prison and the use of it in the subsequent deportation proceeding were contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

Opinions of the District Court.

The District Court (Augustus N. Hand, D. J.) filed two opinions. In the first (Record, pp. 48-49) the Court relied strongly upon the ground that Bilokumsky's counsel in the deportation proceed-

ing did not appear to have objected to the use in evidence of the examination at Moyamensing Prison. An amended return was then filed by leave of the District Court in which was set forth the rule of the Department of Labor that "objections and exceptions of counsel shall not be entered on the record, but may be entered by him in an accompanying brief"; together with an extract from the brief filed by counsel for Bilokumsky in the deportation proceeding showing that objections to both the landing certificate and the examination at Moyamensing Prison were duly made (Record, pp. 40-41). This was admitted by the respondent's supplemental return (Record, p. 45). The District Court then filed a second opinion in which he held that, even though objection was duly taken, the examination at Moyamensing Prison was not, in view of the decision in *Low Wah Suey* v. *Backus*, 225 U. S. 460, inadmissible.

Specification of Errors and Outline of Argument.

The point raised below as to indefinite detention was met by the supplemental return (Record, p. 45), and is therefore not argued. The substance of the assignments of error (Record, pp. 52-53) relied upon is this:

> That the District Court erred in not holding that the use by the Department of Labor in the deportation proceeding of its examination of Bilokumsky at Moyamensing Prison in violation both of the Fourth Amendment and of its own rules was a denial of due process of law.

In this brief we shall treat first the narrower point that by the examination at Moyamensing

Prison and its subsequent use of it the Department of Labor denied the due process and application of its own explicit rules.

We shall then press the broader proposition that, irrespective of the Department's rules, the use of such evidence is inconsistent with the fundamental principles of justice embraced within the conception of due process of law.

POINT I.

By the examination at Moyamensing Prison and its subsequent use of it the Department of Labor denied the due process and application of its own explicit rules.

The inspectors of the Immigration Service have no right to violate the Fourth Amendment. They may not seize the body of a suspect except under a warrant. And a warrant can issue only upon probable cause supported by oath or affirmation. This is required not only by the Fourth Amendment, but also by the Immigration Law and Rules of the Department of Labor under which they act. Immigrant inspectors may subject a person to examination or hearing only after issuance of a warrant and submission of the evidence supporting it to the alien's scrutiny as provided by the rules of the Department of Labor. They are not authorized by those rules to compel aliens or others to answer questions against their will. Agents of the Department of Justice testifying against aliens in deportation proceedings have frequently availed themselves of the right to decline to answer at will.

The following rules of the Department of Labor as to the issuance of warrants and conduct of hearings thereunder were in force at the time of the proceedings in this case:

> "Rule 22, Subd. 3. *Application for warrant of arrest.*—The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence."
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> "Rule 22, Subd. 5 (a). Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable."
>
> "Rule 22, Subd. 5 (b). At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing."

The departmental warrant in this case was not issued until May 19, 1921 (Record, pp. 34-35). Prior to that date an immigration inspector by virtue of the "full and complete co-operation" of

the city authorities who had him in custody (Record, p. 36), made himself a partner in the imprisonment of Bilokumsky and subjected him to interrogation at Moyamensing Prison. Bilokumsky was given no inkling that the interrogation was not compulsory. It was as truly an illegal search of Bilokumsky as the inspector's assumption of custody was an illegal seizure of his person. The examination was given the form and manner of a hearing under a warrant of arrest. The record recites that Bilokumsky was duly sworn and is certified by the inspector-stenographer over his official title as "a correct copy of stenographic notes of hearing." But Bilokumsky was not, of course, allowed to inspect any warrant and supporting evidence; none such existed. Nor was he apprised of his right to counsel. He was entirely deprived of the opportunity to protect himself against unfair practices which the departmental rules contemplate.

The departmental rules above set forth were ignored as completely as if they were non-existant.

Neither of the opinions filed by the District Court addresses itself to the substantive question of the denial to Bilokumsky by the officials of the Department of Labor of the due process of their own rules. The first opinion (Record, pp. 48-49) relies strongly upon the apparent absence of any record of objections by the prisoner's counsel to the use in evidence of the examination at Moyamensing Prison in the proceedings under the subsequently issued warrant. The additional opinion of the District Court (Record, p. 50) recognizes that this ground of decision is removed by the amended traverse (Record, pp. 40-41), which shows that objection was duly taken in accordance with the rules and practice of the Immigration Department. The Court

disposed of the case, however, as if it presented only a question of the prisoner's right to counsel—and as if that question were abstract and not affected by the express rules of the Department. The Court concluded:

> "The relator was accorded counsel at the regular hearing and the absence of counsel at the time he was interrogated, though after his arrest, does not I think in view of the decision in *Low Wah Suey* v. *Backus,* 225 U. S. 460, render the statement by the relator in prison inadmisible" (Record, p. 50).

The decision of this Court thus relied upon by the District Court is not an authority upon the point of due process and application of the Department's explicit rules. There was no claim in the case of *Low Wah Suey* v. *Backus* that departmental rules were evaded. The question was as to the constitutional validity of certain former rules of the Department which are now superseded by those above set forth under which the prisoner is entitled to counsel from the outset of the proceedings. The Court said:

> "It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel."
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> *Low Wah Suey* v. *Backus,* 225 U. S. at 471.

The decision of this Court, apparently given not altogether without hesitation, was that:

> "We are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute" (472).

This question of the limits of departmental authority and discretion in the matter of rule making is entirely other than the question of due application and administration of such rules as the Department, in the exercise of its undoubted authority and discretion, sees fit to promulgate.

These rules have the effect of law and are as binding upon the Department of Labor as is the statute under which they are promulgated.

Caha v. *United States,* 152 U. S. 211, 218.

It may be granted that it is an act of grace for the Department of Labor to award a right of counsel from the outset of proceedings instead of at a subsequent time. But, as District Judge Knox said in *United States ex rel. Weinstein* v. *Uhl,* 266 Fed. 929, 932 (holding that refusal to release on bail a prisoner who refused to answer questions was a denial to him of the due process of the departmental rules as to bail):

> "When the Department of Labor exercises its authority and in so doing accords to an alien rights and privileges which the law says may be accorded to him, I fail to see why the alien is not entitled to their enjoyment."

Valid rules having the force of law may not be cheated even by the power which makes them.

POINT II.

Irrespective of the Department's rules the use of the examination of Bilokumsky at Moyamensing Prison is inconsistent with the fundamental principles of justice embraced within the conception of due process of law.

Due process of law requires that a person whom the law may subject to a loss or penalty be given a hearing. It may be summary. But it must be a fair hearing. The evidence must be of such a character and be so taken and recorded as not to raise a danger or suspicion of foul play. Thus in *Kwack Jan Fat* v. *White*, 253 U. S. 544, 549, where an inspector failed to record in the proper place and manner important testimony which had been adduced, this Court held that the hearing

> "was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law."

It would seem to go without saying that if a judgment of deportation is to rest upon statements or admissions attributed to the person to be deported, those statements or admissions must have been made by him as a free agent, and under circumstances which raise no doubt as to whether they were in fact made as reported. To sanction as a precedent for dealing with suspected aliens the practice adopted in this case would open a wide door for foul practices. It would establish as due process of law the right to deport an ignorant and helpless prisoner upon a statement privately taken

in prison by an official wearing at the same time and moment the multiform aspect of jailer, accuser, prosecutor, stenographer and judge.

While a deportation proceeding is not technically criminal, it involves imprisonment often more rigorous than that of persons accused of crime, and the penalty of deportation is in many cases more terrible in operation than a long term in State's Prison. The observations of this Court in *Brown v. Walker,* 161 U. S. 561, at pp. 596 and 597, apply with the same force to deportation as to criminal proceedings:

> "The maxim *nemo tenetur sepsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant to push him in a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udel, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the Eng-

> lish criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but a general and silent acquiescence of the courts in a popular demand."

This case presents a state of facts strongly similar to those in *United States* v. *Kallas*, 272 Fed. Rep. 742, a case decided in the United States District Court for the Western District of Washington. In that case, as here, federal agents by co-operation with city authorities obtained an opportunity to question the accused while he was imprisoned in a city jail. On the basis of admissions alleged to have been "voluntarily" made by him at this interrogation, he was held by a United States Commissioner to answer a charge of violation of the Mann Act. District Judge Cushman sustained a writ of habeas corpus, saying at page 752:

> "The questioning by or with the consent of his official captor of a prisoner is essentially inquisitorial in its nature. He is confined, and must perforce submit to such questions. True, he may remain silent; but he cannot escape the questions as he might if he were physically free. The actual existence of duress, arising from the fact that he is confined and cannot escape his questioner, is sufficient, and requires that he be advised that he be not compelled to answer, and, if he does so, his answers will be used against him."

The principles repeatedly announced by this Court as to the non-admissibility in the federal courts of evidence obtained by federal authorities as a result of illegal search and seizure are fully applicable.

Gouled v. *United States*, 255 U. S. 298.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385.
Weeks v. *United States*, 232 U. S. 383.
Boyd v. *United States*, 116 U. S. 616.
Flagg v. *United States*, 233 Fed. Rep. 481.
United States v. *Mounday*, 208 Fed. Rep. 186.
United States v. *Mills*, 185 Fed. Rep. 318.
United States v. *Bush*, 269 Fed. Rep. 455.
United States v. *Kraus*, 270 Fed. Rep. 578.
United States v. *Slusser*, 270 Fed. Rep. 818.

To seize and imprison a man's person and subject him to interrogation is no less violative of the Fourth Amendment than a seizure of his papers.

The protection of the Fourth Amendment "reaches to all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws" (*Weeks* v. *U. S.*, *supra*, at p. 392). As this Court said in the *Silverthorne Lumber Co.* case, *supra*, 251 U. S. at 391, the use in evidence of matter obtained in violation of the Fourth Amendment

> "reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

And in *Weeks* v. *United States, supra,* the Court said at page 393:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value and so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *United States* v. *Slusser, supra* (where it was held that consent to a search by an official demanding it as of right was not a waiver of constitutional rights), District Judge Peck said (270 Fed. at 819):

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.
>
> "Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked. * * * A seizure without warrant * * * is an unlawful seizure and cannot be the basis of a valid forfeiture."

The principles of these cases were applied in a deportation case in *Ex parte Jackson,* 263 Fed. Rep. 110. District Judge Bourquin held that the summary character of deportation proceedings afforded no excuse for invasion of constitutional rights. He said (263 Fed. at p. 113):

> "The law and the courts no more sanction such evidence than such methods, and no more approve of either than the thumbscrew and the rack. Otherwise the vicious circle of age-old tyranny—to subject to and convict by unlawful means because guilty, and to condemn as guilty because subjected to and convicted by unlawful means, to which both alien and citizen fall victim. The Declaration of Independence, the writings of the Fathers of our Country, the Revolution, The Constitution and the Union, all were inspired to overthrow the like governmental tyranny. They are yet living, vital, potential forces to safeguard all domiciled in the country, alien as well as citizen."

CONCLUSION.

The order appealed from should be reversed and the writ of habeas corpus sustained.

Dated, October 1, 1923.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 92.

THE UNITED STATES OF AMERICA ex rel. MICHAEL BILOKUMSKY, Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

REPLY BRIEF FOR APPELLANT.

The brief for the respondent misapprehends our main argument. We do not suggest that this case raises the question of constitutional immunity from self-crimination in criminal cases.

It seems advisable to state with distinctness some of the points left partly to implication in our main brief.

1. The old Immigration Rules, permitting *ex-parte* examinations (which this Court held not *per se* unconstitutional, but by no means approved, in *Low Wah Suey vs. Backus*) have been rescinded.

2. The rules now in force (page 7 of our main brief) evince an intention to provide safeguards which the old rules did not. They do not authorize any imprisonment or exercise a domination by Immigration Inspectors prior to the issuance of a Warrant of Arrest. They accord with the Fourth Amendment in requiring probable cause for an arrest. They provide for *immediate* hearing upon arrest, at which the arrested person shall *forthwith* be apprised of his right to counsel and permitted to inspect, and consider with counsel, the evidence relied upon as probable cause. They thus, and doubtless for similar reasons, enact a policy analogous to (but not identical with) that of the constitutional privilege against self-crimination in criminal cases. While it retains these rules, the Department of Labor must live up to them.

3. In this case these rules, and the Fourth Amendment, were evaded. Whatever the legality of Bilokumsky's imprisonment by the Philadelphia authorities, Immigrant Inspector Reiss had no right to become a partner in it. He did so when he took advantage of the "full and complete cooperation" of the Philadelphia authorities, and had Bilokumsky brought before him in Moyamensing Prison for interrogation under oath. This was an unconstitutional seizure and search by him

of Bilokumsky's person. It could not have been sanctioned even under the old Immigration Rules. Inspector Reiss, moreover, did the very thing which the substitution of the new rules was designed to prevent. He examined Bilokumsky *ex parte*, as if at a hearing under a warrant, without apprising him of his right to counsel, or permitting him to inspect and take advice upon any showing of probable cause for believing him to be a deportable alien.

4. This clear deprivation of the safeguards provided by the present rules was a denial of their due process and application. It is manifest that there was no election by Bilokumsky, with knowledge of his rights under the rules, to waive them. Whether Bilokumsky's responses were "voluntary" when measured by the rules which determine the admissability in evidence of confessions in criminal cases, is in this aspect immaterial.

To say, however, that the responses of an ignorant laborer to the questions, or commands, of an official who had summoned him in prison and caused him to be sworn, are *voluntary*, or that he may be presumed to know that he is under no legal compulsion to answer, shocks the sense of reality.

Such overreaching *ex parte* interrogations, in cases which are not criminal and in which there has been no showing of probable cause for regarding the subject as a deportable alien, are pregnant with dangers of oppression more grave than those of the "third degree" in dealing with suspected criminals.

Notes on Cases in Respondent's Brief.

Judge Westenhaver's opinion in the *Kosopud* case, 272 Fed. at 336 (respondent's brief page 6), doubtless following the line of argument presented to him, treats the question rather as of the admissability of confessions in a quasi-criminal case than as of the due process and application of the immigration rules. He lays down a broader rule in favor of the admissability of statemenst of arrested persons than other District Courts have done—a broader rule than does the decision of this Court (Wilson vs. United States, 162 U. S., 613), which he cites. This Court there stressed the fact that there was affirmative evidence that the statements were voluntary, and intimated (page 623) that there might be a contrary presumption if, as here, an oath had been administered by the examiner.

In *U. S. ex rel Rakics vs. Uhl,* 266 Federal, 646, it does not appear that the question of due process and application of the immigration rules was raised.

The extract from *Fong Yue Ting vs. United States,* 149 U. S., 698, 730 (pages 8 and 9 of respondent's brief), might seem, taken without context, to support the extraordinary proposition that in deportation proceedings generally the Fourth Amendment and the principals of due process of law may be disregarded. But the context makes it evident that Mr. Justice Gray meant nothing of the sort. He was holding simply that the Chinese in the particular case was not denied due process

of law or subjected to unreasonable search and seizure by the Act of Congress requiring Chinese to register themselves, and authorizing their deportation unless they could establish their right to remain by the testimony of a credible white witness. It goes without saying that an arrest for deportation would have to be preceeded by a showing of probable cause for believing the subject to be an alien, and one who had not complied with the conditions imposed by Congress on his continued residence here.

The discussion and authorities in the respondent's brief bear no relation to our primary contention that a proceeding conducted in clear violation of the Labor Department's own rules violates the principles of due process of law. The Fourth Amendment was also violated, and, even irrespective of the violation of rules, there is strong ground for holding the proceedings violative of due process of law.

Respectfully submitted,

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